E & L Transport Company, L.L.C. *and* Donald L. Dunsmore *and* Joe M. Renedo. Cases 7–CA–39017 and 7–CA–39029

June 30, 2000

DECISION AND ORDER

On January 9, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below, to modify the remedy as stated below, and to set forth a new Order in light of these modifications.

1. The General Counsel has excepted to the judge's finding that evidence of "special circumstances" justifies a prohibition against employees wearing union insignia on their coveralls while loading and unloading vehicles. We find merit in this exception.

The judge found, and we agree, that the Respondent promulgated an "overly broad" general rule, prohibiting employees from wearing union buttons on their work uniforms, for unlawful retaliatory reasons, in violation of Section 8(a)(1) of the Act. Given this unlawful motivation, it is immaterial that the Respondent might be able to demonstrate "special circumstances" that would justify a narrower rule restricting drivers' wearing of union insignia on their coveralls only during the loading or unloading process.[3] As the Board stated in *Times Publishing Co.*, 240 NLRB 1158, 1160 (1979), enfd. 605 F.2d 847 (5th Cir. 1979), "once a rule is found to be generally invalid, it is invalid for all purposes and cannot be applied as valid in part to a specific area." We are not downplaying the Respondent's legitimate interest in seeking to prevent personal injury or property damage. We are simply ruling that, in this case, as found by the judge, the Respondent did not impose the general rule for safety or damage control reasons, nor did it inform its drivers of any such reasons. Rather, the Respondent's motive for promulgating the rule was to retaliate against employees for their exercise of Section 7 rights, and this "special circumstance" defense was an after-the-fact attempt to disguise this motivation. To remedy that violation, the entire rule must be rescinded, and we shall modify the judge's recommended Order and Notice accordingly.

2. On September 20, 1996, the Respondent's terminal supervisor, Mike Ervin, told driver Ed Reese to remove two stickers that Reese had placed on his safety helmet. Reese pursued this matter with Chris Trimble, the Respondent's assistant terminal manager. After contacting an official in the Respondent's labor relations department, Trimble reaffirmed Ervin's directive that Reese had to remove the stickers. Because Reese wanted to file a grievance in order to test the propriety of this order, he refused Trimble's repeated demands to remove the stickers until Trimble issued him a grievable 1-day suspension. The record shows that Reese received a written document signed by Trimble informing him of this suspension.

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Reese for failing to remove the stickers from his safety helmet. The General Counsel has excepted, however, to the judge's failure to provide any backpay for Reese's loss of work. Although the record is unclear as to whether Reese actually served this 1-day suspension, we grant the General Counsel's exception and, accordingly, we will further modify the judge's remedy to make Reese whole for any loss of earnings he may have suffered by virtue of the Respondent's discrimination against him, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4] We shall also modify the judge's conclusions of law, order, and notice to reflect the written suspension that the Respondent issued to Reese.

AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 4.

"4. By suspending employee/alternate union steward Ed Reese on September 20, 1996, for failing to remove stickers from his safety helmet, the Respondent has engaged in conduct that violates Section 8(a)(3) and (1) of the Act."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent violated, inter alia, Sec. 8(a)(4) of the Act by issuing a written reprimand to employee Donald Dunsmore, we rely solely on the evidence showing that the Respondent's discipline was in retaliation for Dunsmore's filing of an unfair labor practice charge with the Board.

No exceptions were filed to the judge's conclusion that the Respondent did not violate the Act by telling Charging Party Donald Dunsmore that internal union campaign signs were prohibited in or on the Respondent's trucks (JD fn. 18 and Conclusion of Law 7).

[3] We note, in any event, that the "special circumstances" exception is narrow. As the judge noted, a rule which curtails an employee's right to wear union insignia at work is *presumptively* invalid, and can be justified only where special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety. *Kendall Co.,* 267 NLRB 963, 965 (1983) (special circumstances based on safety considerations justified employer's dress code policy).

Assuming the Respondent subsequently promulgates a narrower rule, Member Brame would agree with the judge that the Respondent could establish "special circumstances" that justify a prohibition against drivers wearing any buttons or other insignia on their coveralls while loading and unloading vehicles from its car carriers in order to prevent personal injury and vehicle damage during this process.

[4] The Respondent will have the opportunity to show in compliance that Reese did not incur any loss of earnings and thus is entitled to no backpay.

ORDER

The National Labor Relations Board orders that the Respondent, E & L Transport Company, L.L.C., Wayne, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Subjecting its employees to excessive scrutiny by conducting a search of company trucks for internal union campaign literature, including using a camera to take pictures, because the affected employees engaged in activity protected by the Act.

(b) Impliedly threatening employees with termination because of internal union campaign literature found in their company trucks.

(c) Announcing to employees that its rules prohibit employees from placing stickers and/or signs on bump hats.

(d) Threatening employees with termination because of their failure to remove stickers and/or signs from bump hats.

(e) Harassing employees and ordering them to remove internal union campaign stickers from their bump hats.

(f) Promulgating an overly broad rule prohibiting employees from wearing internal union campaign buttons on their uniforms and ordering employees to remove buttons from their uniforms.

(g) Referring to employees as troublemakers in an attempt to coerce, restrain, and interfere with employees' rights guaranteed by Section 7 of the Act.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind disciplinary action issued to employees Donald Dunsmore and Ed Reese and remove from its files any reference to this unlawful discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline it imposed will not be used against them in any way.

(b) Make whole Ed Reese for any loss of earnings and other benefits he suffered as a result of the discrimination against him, in the manner set forth in section 2 of this decision, supra.

(c) Return to the status quo existing before September 15, 1996, with respect to its practice of allowing employees to wear buttons and pins on uniforms and stickers on bump hats, and rescind the rule prohibiting the wearing of stickers on bump hats and the wearing of buttons and pins on uniforms.

(d) Within 14 days after service by the Region, post at its facilities in Woodhaven, Wayne, Dearborn, Flat Rock, Detroit and Wixom, Michigan; Chicago, Illinois; Cincinnati and Lorain, Ohio; Milwaukee, Wisconsin, and Lafayette, Indiana, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT subject our employees to excessive scrutiny by conducting a search of company trucks for internal union campaign literature, including using a camera to take pictures, because the affected employees engaged in activity protected by the Act.

WE WILL NOT impliedly threaten employees with termination because of internal union campaign literature found in their company trucks.

WE WILL NOT announce to employees that our rules prohibit employees from placing stickers and/or signs on their bump hats.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten employees with termination because of their failure to remove stickers and/or signs from their bump hats.

WE WILL NOT harass our employees and order them to remove internal union campaign stickers from their bump hats.

WE WILL NOT promulgate an overly broad rule prohibiting our employees from wearing internal union campaign buttons on their uniforms and order employees to remove buttons from their uniforms.

WE WILL NOT refer to our employees as troublemakers in an attempt to coerce, restrain, and interfere with employees' rights guaranteed by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the disciplinary action issued to Donald Dunsmore and Ed Reese and remove from our files any reference to this unlawful discipline, and within 3 days thereafter notify these employees in writing that this has been done and that the discipline we unlawfully imposed will not be used against them in any way.

WE WILL make whole Ed Reese for any loss of earnings and other benefits he suffered as a result of the discrimination against him, in the manner set forth in the Board's decision.

WE WILL return to the status quo existing before September 15, 1996, with respect to our practice of allowing employees to wear buttons and pins on their uniforms and stickers on their bump hats.

WE WILL rescind the rule prohibiting the wearing of stickers on bump hats and the wearing of buttons and pins on uniforms.

E & L TRANSPORT COMPANY, L.L.C.

Linda Rabin Hammell, and *Kristen Niemi*, *Esqs.,* for the General Counsel.

Donald R. Scharg and Thomas A. Pinch, *Esqs*., of Bloomfield Hills, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Detroit, Michigan, on June 4–6, 1997. A charge was filed by Donald Dunsmore, an individual, in Case 7–CA–39017 on September 23, 1996, and he filed an amended charge on November 8, 1996. The charge in Case 7–CA–39029 was filed by Joe Renedo on September 25, 1996.[1] The order consolidating cases, consolidated complaint and notice of hearing (the complaint) was issued on December 30. Briefs were received from the parties on or about August 18, 1997. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

[1] All dates are in 1996 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

E & L Transport Company, L.L.C. (E & L or Respondent), a corporation, engages in the transportation of automobiles for various automobile manufacturers. It maintains its headquarters in Wayne, Michigan, and as pertinent, has facilities at Woodhaven, and Wixom, Michigan; Lorain, Ohio; and Chicago, Illinois. The Respondent admits the jurisdictional allegations of the complaint and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is admitted and I find that Local 299, International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

E & L is engaged in the business of transporting new vehicles, primarily manufactured by Ford Motor Company, to automobile dealerships. Its headquarters and offices are located on Michigan Avenue, near Ford's assembly plant, in Wayne, Michigan. The Company has six terminals: Woodhaven, Michigan; Cincinnati and Lorain, Ohio; Chicago, Illinois; Milwaukee, Wisconsin; and Lafayette, Indiana. With respect to the Woodhaven terminal, drivers load out of E & L's facilities in the Detroit Metropolitan Area, which in addition to Woodhaven includes facilities in Dearborn, Wixom, Flat Rock, Detroit, and two facilities in Wayne, Michigan.

E & L's Detroit area drivers, at issue in this case, have been represented for over 40 years by the Union. The bargaining relationship is governed by the National Master Automobile Transporters Agreement and the Central and Southern Areas Supplemental Agreement, the most recent of which contracts are effective from May 22, 1995, through May 31, 1999. E & L has between 350 and 375 employees at its Woodhaven terminal, including about 190 active truckdrivers, as well as mechanics, clerical workers, dispatchers, and managerial employees. The Woodhaven terminal covers about 215 acres and uses about 110 acres, which includes its buildings, as well as parking for the vehicles to be transported and for the E & L trucks. As many as 75 to 100 trucks can be accommodated by the loading area at one time.

Wayne has three separate shipping yards and a truck parking area, which occupy about 16–18 acres, in addition to its office area. About 55 drivers operate out of the Wayne facility. The Michigan truck plant and Wayne assembly dock areas of E & L's Wayne facility can each accommodate about 25 trucks at a time.

At each terminal, the highest level managerial employees are the terminal manager and assistant terminal manager. Gerald Clemens and Chris Trimble were employed in these positions, respectively, at the Woodhaven Terminal in 1996. The next level of management at the terminals are operations/loading supervisors, yard supervisors, and shop supervisors. Both Woodhaven and Wayne have three operations/loading supervisors. Mike Ervin was the operations/loading supervisor with the most contact with drivers at the Woodhaven terminal in 1996. At the Wayne facility, Jim Donlin, Ted Marcott, and Sean McCarty were operations/loading supervisors.[2] Operations/loading supervisors manage the activities of drivers on a day-to-day basis at Woodhaven and

[2] McCarty, Donlin, and Marcott's names are spelled in a variety of ways in this record. I have adopted the spelling of these men's names from Respondent's brief as it should be the most informed source on this matter.

Wayne, including helping drivers with loads, auditing loads, and instructing how to load trucks with particular vehicles. They also deal with matters concerning the drivers and problems the drivers might be having, set up dispatching boards, and handle any problems with deliveries or delays.

None of the supervisors is solely a loading supervisor. Each has operations supervising responsibilities. Therefore, the supervisors spend as much as half of their time inside the facility offices, rather than outside with the drivers during loading. Though they may go outside four to six times a day, the operations/loading supervisors do not know which drivers they will see or how many drivers they may see, as drivers come to the facility at varying times, load their vehicles and then leave. Not all drivers are in contact with supervisors on a regular basis, though regular contact is not unusual. E & L also employs a shop supervisor who supervises the mechanics and also interacts with drivers.

For approximately 10 years, E & L has required that its drivers wear uniforms and supplies them to the drivers. The uniforms consist of shirts, pants, and coveralls. The coveralls are supposed be worn while loading and unloading automobiles. Since the first of 1996, it has required the drivers to wear hard hats it calls "bump" hats, during the loading and unloading process. It maintains the following rules involving solicitation and distribution:

> The Company prohibits posting any materials on company premises, equipment and bulletin boards.
>
> Non-employees of E & L Transport Company and Transportation Releasing, Inc. are prohibited from soliciting or distributing at any time on Company premises.[3]
>
> Employees are prohibited from soliciting during working time.
>
> Employees are prohibited from distributing materials during working time and in working areas.
>
> The Company will enforce the above policies uniformly.

The complaint alleges that Respondent disparately enforced the above quoted rules by:

1. About September 17, at its Wixom facility, by its agent Jim Donlin, subjecting its driver employee Donald Dunsmore to excessive scrutiny by conducting a search of his company truck for internal union campaign literature, including using a camera to take pictures.[4]

2. About September 18, outside a restaurant in Taylor, MI, by its agent Lawrence F. Murray:

> a. Advising Dunsmore that internal union campaign signs were prohibited in or on Respondent's trucks.
>
> b. Subjecting Dunsmore to excessive scrutiny by conducting a search of his truck for internal union campaign literature and/or campaign signs.
>
> c. Impliedly threatening Dunsmore with termination because of internal union campaign literature found in his company truck.

3. About September 20, at its Woodhaven facility, by its agent Murray, orally announcing to employees that its rule prohibited employees from placing stickers and/or signs on bump hats.

4. About September 20, at its Woodhaven facility, by its agents Murray and Gerald Clemens, threatening employees with termination because of their failure to remove employee stickers and/or signs from bump hats.

5. About October 16, at its Woodhaven facility, by its agent Mike Ervin, stating he was at Woodhaven to harass Dunsmore and ordering him to remove internal union campaign stickers from his safety hat.

6. About October 16, at its Woodhaven facility, by its agent Chris Trimble, ordering Dunsmore, under threat of reprimand and discharge, to remove internal union campaign stickers from his bump hat.

7. About October 16, at its Wixom facility, by its agent Ron Kilmer, ordering Dunsmore to remove stickers from his bump hat.

8. About the end of October, at its Wayne facility, by its agents Ted Marcott and Sean McCarty, on separate occasions, ordering its employees to remove stickers and/or signs from bump hats.

9. About the first week of November, at its Wayne facility, by its agents Mike Ervin and Ted Marcott, ordering employees to remove stickers from their bump hats.

10. About October 25, at its Woodhaven facility, by its agent Chris Trimble, orally and disparately promulgating an overly broad rule prohibiting employees from wearing internal union campaign buttons on their uniforms and ordering Dunsmore to remove a button from his uniform.

11. About late October, at its Chicago facility, by its agent William Erb, orally and disparately promulgating an overly broad rule prohibiting employees from wearing internal union campaign buttons on their uniforms.

12. About October 29, at its Woodhaven facility, by its agent Gerald Clemens, referring to Dunsmore as "the troublemaker."

13. About September 23, at its Woodhaven facility, issuing a written reprimand to employee/alternate Union Steward Ed Reese for failing to remove stickers from his bump hat.

14. About September 23, at its Woodhaven facilities, by its agents Chris Trimble and Gerald Clemens, issuing Dunsmore a written reprimand for having internal union signs in his truck.

B. E & L's Uniform Program and its Enforcement of Rules Governing the Program

E & L initiated its uniform program in June 1987 at the direction of its primary customer, Ford Motor Company. Drivers are required to comply with the program, rules, and regulations for drivers. All of the uniforms are owned and provided by E & L. Drivers are to wear their uniforms while on duty and to keep them clean and neat. The uniform program was posted initially by the dispatch window and later in the driver's breakroom. Communications to employees of the requirement for uniforms was also accomplished through meetings with business agents, stewards, and committee members. Article 31 of the collective-bargaining agreement permitted the Company to require the wearing of uniforms, and article 40(3(d)) requires that drivers maintain a "reasonably neat appearance."

Drivers must wear the company-provided uniforms while on duty, including "all time spent in loading, unloading, driving, delivering and when being dispatched from an E & L or other carrier terminal." Since January 1996, drivers have been required to wear bump hats during the loading and unloading process. While maintaining rules apparently prohibiting the placement of any type insignia on company supplied uniforms without com-

[3] Transportation Releasing, Inc. is a commonly owned company that is not involved in this matter.

[4] Respondent in its answer admitted the supervisory and agency status of Lawrence R. Murray, Gerald Clemens, Jim Goltz, Chris Trimble, Ken Bennett, Ted Marcott, Sean McCarty, Jim Donlin, Mike Ervin, Robert Braden, Ron Kilmer and William Erb.

pany approval, there is considerable question raised in this record about the actual enforcement of such rules.[5]

Paragraph VI of the uniform program establishes that "[d]rivers may not alter their garments in any manner not approved by the Company." Moreover, the uniform program provides that "[n]o additional patches, pins or iron-on transfers of any kind may be affixed to the uniforms." According to Director of Labor Relations Lawrence Murray, this prohibition was included in a list of rules which was posted by the Company at its dispatch windows in 1987. The rules regarding uniforms was the subject of a July 8, 1994 memorandum from E & L Vice President T. R. Atkins to all terminal managers. The memo, after noting that the Company has become lax in [its] uniform program, reiterated that "[a]ll employees must comply with the rules and procedures . . . and those employees not complying will be subject to disciplinary action." The memorandum included a list of the rules, one of which was the rule against affixing any insignia to the uniforms. There is no credible evidence that Detroit area terminal managers distributed that list to drivers, or that drivers ever saw it. Woodhaven Terminal Manager Clemens testified that the list is posted in the terminal. However, both current steward Joe Renedo and former steward Donald Dunsmore testified that they never saw the list. They also testified that they went to the terminal after their initial testimony and looked for the list on the bulletin board where it was allegedly posted, and could not find it. I credit the drivers' assertion that it is not so posted. In addition to their testimony, there was evidence that on August 3, 1995, Clemens issued a memo to drivers outlining the Company's uniform policy. Clemen's memo not only fails to attach the list in question, but it omits any internal reference to a ban on the wearing of "patches, pins or iron-on transfers."

The testimony of the driver witnesses was generally to the effect that drivers have long worn a variety of personal items on their uniforms and have worn personal clothing with their uniforms without comment from management. Driver Dunsmore testified that he wears a Firestone pocket protector with pens each day while working. He also wears a personal shirt underneath his uniform shirt, and his own jacket over his uniform while he loads, unloads and transports new vehicles. Many of the drivers wear their own baseball caps adorned with metal pins and buttons during their workshifts, and have never been ordered to remove the items. The record is also replete with evidence that Respondent has long allowed drivers' to display miscellaneous insignia on their official uniforms. Many drivers have work buttons on their uniforms, including their coveralls, on a daily basis over the past years. Ed Reese testified that he has worn and still wears buttons on his uniform shirt and coveralls which read as follows: "Teamster Car-Haulers Gearing Up for Our Future," and "Stop Scab Papers." Further, Reese has seen drivers wearing the following buttons on their uniforms and coveralls: "Don Smith for President—No Dues Increase—Teamster Local 299," "We Will Fight for Our Future," "Hoffa '96—Restore the Power," "Vote Cammarata Slate," "Elect the Larry Brennan Teamster First Slate for Local 337," "Stop Scabs," "Teamsters 299 Steward," and "Ron Carey Slate '96—Putting Members First." Reese and Dunsmore specifically recalled driver Dennis Wade, among others, wearing a "Teamsters for a Democratic Union—TDU" button on his shirt or coveralls.

Dunsmore testified that he has worn or seen other drivers wear the following buttons, pins, or patches: "E & L 14 Year Safe Driving" patch;" "We'll Fight For Our Future-Teamsters Car Haul Contract '92;" "Teamsters for a Democratic Union;" "Hoffa '96—Restore the Power;" "Ron Carey Slate '96—Putting Members First;" "Elect the Larry Brennan Teamsters First Slate for Local 337;" "Vote Cammarata Slate;" "Stop Scabs;" "Stop Scab Papers;" "Teamsters Union Service;" "Buy American;" "Teamsters Local 299 Steward;" "E & L A.C.E.;" "National Safety Council 3 Year Safe Driver Award;" "Teamster 5 Year Service;" "Grandpa;" and two "Safe Driver E & L," metal pins. The last pin mentioned by Dunsmore refers to metal pins and fabric patches that E & L awards drivers for safe driving records. Reese testified that drivers wore these on their collars and pockets. The most credible evidence is that Respondent allowed these pins to be worn at the employees' discretion.[6]

Joe Renedo, current union steward at E & L's Woodhaven Terminal, testified that he has worn campaign buttons on his uniform during local union elections and during the first Ron Carey campaign. He was not told by management that he could not do so during these campaigns. During 1995 contract negotiations he wore a button saying "Gearing Up for Our Future." He distributed this button to other drivers, who also wore it on their uniforms.

As noted earlier, E & L in January 1996 implemented a rule requiring the wearing of bump hats when the drivers loaded or unloaded new cars to or from their trucks. The Union grieved the rule and the grievance was denied. Immediately following the institution of the bump hat requirement, drivers began personalizing their head gear, just as they had long customized their uniforms. Many drivers affixed stickers stating, "I protest wearing this helmet."[7] Driver Brian Orluck testified that he complained about the unattractiveness of the hat to Assistant Terminal Manager Jim Goltz, who responded that he did not care if Orluck painted his bump hat pink and put yellow flames on it so long as he wore it.[8] From January 1996 well into autumn of that year, drivers wore these protest stickers along with other types of decals, such a sports team logos, Teamster insignias, National Rifle Association logos, union election material, American flags, and 4x4 truck ads, without interference by management.

Respondent offered credible evidence that it waged an ongoing campaign against the placing of stickers on its trucks and other physical equipment. However, based on the credited evidence, there was no effort made by Respondent to keep drivers from wearing insignia on their uniforms and bump hats until mid-September 1996. Respondent takes the position that it has always enforced its rules regarding not allowing pins and other insignia on uniforms and stickers on bump hats. Its position is that supervi-

[5] The requirement for wearing bump hats is set forth in a document called "Personal Protective Equipment Head Protection." The rules set out in this document are silent as to the placement of stickers or other material on the bump hats, and drivers received no oral instructions in this regard. The bump hats supplied by E & L cost $3.65 each.

[6] Respondent Safety Director Danny Danielczyk testified that for the first year in which the awards were given, he instructed recipients of them not to wear the awards on their uniforms. On the other hand, Reese, Dunsmore, and Joe Renedo all received such awards in 1995 and never received such instruction. Danielczyk admitted that he has not given instructions about the awards for the past 2 years.

[7] E & L driver Gene Frank had such a sticker on his bump hat from April until he was told to remove it in November. He was told by Supervisor Ted Marcott that it was against company policy to place stickers on bump hats. Prior to this occasion, Frank had never been told about such a policy.

[8] Orluck testified that he placed a "Carey" sticker on his logbook in 1992. In December 1996, Terminal Manager Clemens asked him to remove it. He also wore a "Carey" campaign button on his uniform during the 1992 campaign, without management interference.

sors regularly enforced the rules when they observed a violation of them. It explains the apparent contradiction between this testimony and driver witnesses' voluminous testimony about numerous incidents of such items being worn by drivers by asserting that such incidences simply escaped the attention of supervisors. I credit the drivers' testimony and not that of Respondent's witnesses. Respondent's own evidence, the memorandum of Atkins, notes that enforcement of the rules had become lax.

C. The Hoffa–Carey Election and the Protected Activity of Donald Dunsmore

In 1996, the Teamsters held a mail-ballot election between candidates Jimmy Hoffa Jr. and incumbent Ron Carey. The ballots were mailed in November and were counted on December 13. During the course of the campaign and election, specially appointed election officers received and investigated protests regarding the election process. Local Teamster members had 24 hours in which to lodge protests with Michigan Regional Officer Bill Wertheimer, who would investigate the protest and issue a decision.

Among the E & L drivers in the Detroit area facilities, the Hoffa-Carey election generated staunch supporters on both sides. Throughout the long preelection campaign, drivers wore buttons and stickers advertising their choice for president. There is no evidence that the varying union political views held by the drivers caused any disturbances or interruptions of work at E & L. One particularly strong supporter of the Hoffa slate was driver Donald Dunsmore. He has worked for E & L for 26 years. During his long tenure, Dunsmore has served as the union steward three different times, in 1982, from 1986 to 1989, and from 1994 until his sick leave in January 1996. In April 1996, while on sick leave, Dunsmore filed NLRB charge Case 7–CA–38439, alleging that E & L discriminatorily removed union literature, including campaign material, regarding the Teamster's internal election. Complaint issued, and a settlement was obtained.[9] Pursuant to the settlement of Case 7–CA–38439, Respondent posted a notice to employees on a bulletin board in the Woodhaven drivers' dispatch area on July 1. The Board required that the notice remain posted for 60 days.

Starting in January 1996, Dunsmore campaigned for Hoffa at E & L's facilities. About August 24, he filed a protest with the election officer about E & L's alleged disparate refusal to allow James Hoffa Jr. to campaign on E & L premises, while at the same time allowing Local 299 Business Agent Billy Scott to campaign there for Ron Carey. Respondent received notice of the protest about August 30. A decision issued September 18, granting Dunsmore's protest in part. On September 30, the election officer issued a supplemental decision denying Dunsmore's protest. Dunsmore filed another election protest about October 16, alleging that E & L discriminatorily disallowed "Hoffa" stickers while permitting "Carey" stickers on drivers' bump hats. The election officer denied Dunsmore's protest by decision dated November 4.

D. Respondent Begins Enforcing its Rules Regarding Uniforms

As noted above, the credible evidence establishes that for years the Respondent had allowed the wearing of various insignia on drivers' uniforms without interference and had since January 1996 allowed the placing of various stickers on bump hats. That leniency stopped beginning in September 1996, just a month after Dunsmore filed his first election protest and only about 2 weeks after the conclusion of the NLRB notice posting period. Significantly, Dunsmore was the first target of the newly stringent enforcement of company rules. On September 17, Dunsmore was approached at the Wayne loading yard by Operations/Loading Supervisor Jim Donlin, who asked Dunsmore if he had campaign literature showing from or stuck to Dunsmore's company truck. Dunsmore responded he had, but informed Donlin that the literature was not "stuck," but instead propped up. In fact, Dunsmore had two "Hoffa '96" stickers propped with paperclips in the front and side cab windows of his truck, and an orange streamer which read "Hoffa" hanging from the coat rack in the truck's cab. Donlin, who carried a camera with him, made the inquiry at the request of Terminal Manager Clemens and Labor Relations Director Lawrence Murray. Donlin did not instruct Dunsmore to remove the campaign material. Donlin confirmed in his early testimony that he did not ask Dunsmore to remove the campaign signs when he first encountered Dunsmore. However, he later remembered that he subsequently talked to Clemens again and was told to have Dunsmore remove them. He testified that he then found Dunsmore at the dispatch window and told him Clemens had said to take down the signs. I do not credit this testimony. Clemens did not testify that he told Donlin to have Dunsmore remove the signs and further, specifically stated that Dunsmore's subsequent discipline was not issued for refusing to obey an order from management.

The next day, September 18, Dunsmore stopped for coffee and breakfast at a restaurant in Taylor, Michigan. In the restaurant parking lot, Dunsmore encountered E & L's Labor Relations Director Lawrence Murray. According to Dunsmore, Murray asked if Dunsmore had put the union material in the truck. Dunsmore answered yes. Murray then complained that Dunsmore had done so even while protesting Billy Scott's electioneering and the Company's alleged unfair labor practice of removing union literature. Murray ordered Dunsmore to remove the Hoffa material, stating, according to Dunsmore, "You take this stuff down now or else. This is your last warning." Dunsmore complied. According to Dunsmore, Murray also demanded access to the truck's cab and Dunsmore let him in. Dunsmore testified that this was the only conversation that he had with Murray about the Hoffa signs.

Murray had a different version of this incident. He recalled that on September 17, he was driving through Taylor, Michigan, and saw a partially loaded E & L truck in a strip mall. As this was an unusual place for a company truck to be parked, he pulled in to investigate. When he approached the truck, he observed the "Hoffa '96" signs in the truck's windows. He recorded the truck number and went to his office. He called the Woodhaven terminal manager and asked for the identity of the truck's driver. Murray learned that Dunsmore was the driver of the truck and that it had been dispatched from the Wayne terminal. Murray instructed the Wayne terminal personnel to take a photo of the truck if it returned and to advise Dunsmore to remove the signs from the windows. Later that day, Murray was advised that Dunsmore had returned to the terminal, that a photo had been taken and Dunsmore had been told to remove the signs.

On September 18, Murray was driving through Taylor, Michigan, and again saw Dunsmore's truck at the strip mall. He pulled in and again observe the Hoffa signs in the truck windows. Dunsmore came up to him and Murray asked why the signs were there, noting that Dunsmore knew better than to put signs in his

[9] One will never know the whole truth about the merits of the complaint. However, from Respondent's point of view, the union campaign did cause a great deal of defacing of company property. Numerous photographs in evidence show campaign stickers plastered on public phones, bathroom walls, telephone poles, and fences in and around the Detroit area terminals.

truck windows. According to Murray, Dunsmore replied that Billy Scott had been at the terminal campaigning for Carey. Murray replied that Dunsmore knew of the campaign rules, so why did he put a Hoffa sign in the truck. Murray instructed him to remove the signs. Murray denied threatening Dunsmore with termination and denied getting into the truck's cab, though admitting that Dunsmore opened the cab door and he looked in.

This was Dunsmore's first warning on the subject. Although Dunsmore never disobeyed an order to remove the Hoffa signs, on September 22 or 23, he received a disciplinary notice dated September 20 for "flagrant disobeying of orders (violation of company policy regarding solicitation and distribution)." Assistant Terminal Manager Chris Trimble, who signed the reprimand, informed Dunsmore that Clemens had instructed him to writeup Dunsmore. When Dunsmore pursued the matter with Clemens, Clemens responded, "[Y]ou were campaigning . . . [j]ust write your grievance, [d]on't even argue about it." Clemens testified that Dunsmore had not disobeyed any order from management, rather he had disobeyed the company rule prohibiting the placing of any material on company equipment.[10] Clemens noted that in the past drivers had been required to removed stickers from company trucks. These stickers contained the "handle' the driver used on the CB radios in the trucks at that time. There is no evidence in the record that any driver has been previously disciplined for putting a sticker on a company truck.[11] No employee of Respondent was disciplined for putting campaign stickers on other company equipment such as toilets, bathroom mirrors, pay phones, and terminal walls though such activity was widespread during the fall of 1996. To the extent that there is a credibility determination to be made with respect to this incident, I credit Dunsmore's version. There are certain internal contradictions in the testimony of Respondent's witnesses on the matter which makes their memory of the events questionable.

According to Dunsmore, during all of these conversations with supervisors, he wore Hoffa stickers pasted onto his bump hat and a Hoffa '96 button on his uniform. He was not then asked to remove them. On October 16, however, when Dunsmore was loading his truck at the Woodhaven facility, Operations/Loading Supervisor Michael Ervin drove up and warned, "I'm here to fuck with you." Dunsmore replied, "What are you talking about?" Ervin then stated: "You've got to take that stuff off your hat," referring to Dunsmore's Hoffa stickers. Dunsmore then asked for something in writing. Dunsmore then left Ervin and proceeded into the drivers' room to meet with Assistant Terminal Manager Chris Trimble. Trimble confirmed that Dunsmore's stickers on his bump hat had to come off, and warned that if Dunsmore persisted in refusing, he would be discharged. Dunsmore promptly removed the stickers, leaving a white sticky backing on the hat.[12]

Later on October 16, Dunsmore was at E & L's Wixom yard, then Operations Supervisor Ron Kilmer approached and told him to take the stickers off his bump hat. Dunsmore stated that they were already off. Kilmer looked at the hat again and agreed. Other drivers whom Dunsmore saw that day at Wixom with stickers on their bump hats were similarly directed to remove them. On October 25, Dunsmore placed a call to Board Agent Joan Wesa from a pay phone in the drivers room at the Woodhaven terminal. During this conversation, Trimble approached Dunsmore, pointed to a Hoffa '96 button on Dunsmore's uniform and stated that it had to go. Dunsmore took the button off and never wore it again.[13] This was the first time he had been told that he could not wear a button on his uniform. He had been wearing one all during the campaign, including the days in which he had run-ins with Director of Labor Relations Murray, Terminal Manger Clemens, Assistant Terminal Manager Trimble, and Supervisors Ervin and Donlin.[14] According to Dunsmore, at about this time, all drivers who had been wearing buttons on their uniforms stopped wearing them.

In late October, Dunsmore was using the copy machine when Terminal Manager Clemens walked by and stated, "There's the trouble-maker." Though Clemens denied the words used by Dunsmore, he admitted saying, "Oh, Oh, here comes trouble," meaning, according to Clemens, that Dunsmore was filing another greivance.

For at least 3 months before Respondent's suppression of Dunsmore's union displays in September, driver Ed Reese wore both a Teamster logo sticker and an NRA sticker on his bump hat. No one in E & L's Detroit area management spoke to him about the decorations. However, on September 15, he was in the Chicago terminal and was told by a Chicago terminal supervisor to remove the stickers. He refused and nothing more was said about the matter. Reese testified that the supervisor told him that the Chicago terminal had instituted a blanket policy of not allowing stickers on bump hats. On September 20, Woodhaven Terminal Supervisor Mike Ervin told Reese to remove the stickers from his bump hat. Reese pursued the matter with Assistant Terminal Manager Trimble. After telephoning Lawrence Murray privately, Trimble called Reese back into the office and stated that Murray had advised Trimble to have Reese take the stickers off his bump hat. Reese asked what would happen if he refused. Trimble responded he would issue progressively more severe reprimands, resulting ultimately in discharge for the flagrant disobeying of an order. In order to test the propriety of the order, Reese resisted until he was presented with a grieveable suspension for disobeying orders. Reese then agreed to remove the stickers. The following week, Ervin told Reese that Terminal Manager Clemens, who was not present for this session, stated that if he had been present,

[10] Clemens version of what caused Dunsmore to be disciplined given on cross-examination varied from that given by Murray. He testified that on September 17, he was informed by Donlin of the stickers on Dunsmore's truck. He then testified that on September 18, Murray called and told him that he had seen the stickers on Dunsmore's truck in Taylor, Michigan. Clemens version is close to that given by Dunsmore. Subsequently, on redirect examination, upon being asked a leading question, he "recalled" that Murray had also called him on September 17. Donlin testified that he took the photographs of Dunsmore's truck after being told to do so by Clemens. According to Donlin, Clemens told him he had seen the truck passing his window and saw the Hoffa signs.

[11] In this regard, E & L's maintenance supervisor, Robert Braden, testified that in the past he had seen political stickers on company trucks, including ones dealing with scab newspapers, union stickers, American flags, and other types. He either personally removed these stickers or had them removed. He evidently took no disciplinary action against the drivers who affixed these stickers to their trucks.

[12] Driver Michael Hewer began wearing a "Carey" sticker on his bump hat in August. In mid-October, he was instructed by Supervisor Ted Marcott to remove it. He complied with this request, however, he put another one on 3 days later. Supervisor Sean McCarty observed this new sticker and ordered Hewer to remove it. He did so and quit wearing stickers on his bump hat. Hewer testified that one of Respondent's supervisors at its Loraine, Ohio terminal has for a long time worn a sticker depicting the American flag on his bump hat.

[13] Trimble acknowledged that this incident occurred, adding he told Dunsmore that he could wear the button on his personal clothes.

[14] Dunsmore stated that about a month prior to hearing, he had again begun wearing a button on his uniform. This one reads "No Scab Papers." He had not been instructed to remove this button.

Reese would have been promptly terminated. Reese on this occasion was wearing a button on his uniform that read "Stop Scab Papers." He was not told to remove it during this disciplinary session.

Subsequent to September 20, Reese heard Ervin ask two other drivers, Scott Johnson and Bryce Mackens, to remove stickers from their hats.

Driver Mike Hewer wore a Carey sticker affixed to the front of his bump hat and a Carey button on his uniform beginning in August. Not until late October was Hewer told to remove the sticker, first by Yard Supervisor Ted Marcott and shortly thereafter by Supervisor Sean McCarty. Prior to this, Hewer knew of no rule against the wearing of such decals and had worn his Carey sticker with impunity. Similarly, Hewer wore his Carey button without admonition until October when, after he had completed loading and had removed his coveralls, Chicago Terminal Supervisor Bill Erb told him to remove the button from his uniform shirt.

Beginning in April or May, driver Gene Frank attached a yellow sticker reading "I protest wearing this helmet" to his bump hat. He wore it without incident until November, when Supervisor Mike Ervin ordered him to remove it. Frank postponed complying because he was loading his truck and did not want to break his concentration. Later in the same day, Supervisor Marcott also told Frank to remove the sticker. Because he did not want to be disciplined for defacing company property, Frank did not remove the sticker, but rather concealed it by placing two pieces of black electrical tape over it. Management never complained about the resultant homely appearance of the hat.

E. The Respondent Unlawfully Discriminated Against Dunsmore and Reese and Unlawfully Prohibited the Wearing of Union Insignia on Uniforms and Hats

The Board and courts recognize employee's right under Section 7 of the Act to wear and display union insignia on their persons while at work. Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia is violative of Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945).[15] The Board, in cases involving interference with that right, has reasoned as follows:

> While employees have the right to wear union insignia at work, employers have the right to take reasonable steps to insure full and safe production of their product or to maintain discipline. Therefore, the Board holds that a rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety. [*Kendall Co.,* 267 NLRB 963, 965 (1983).]

The right to wear union insignia at work applies equally to the wearing of stickers on bump hats. *Eastern Omni Constructors,* 324 NLRB 652 (1997); *Northeast Industrial Service Co.,* 320 NLRB 977 (1996); *Feldkamp Enterprises,* 323 NLRB 1193 (1997). Therefore any attempt to prohibit the wearing of stickers on bump hats must also be justified by "special circumstances." *Northeast Industrial Service Co.,* supra at 979.

Special circumstances warranting a prohibition may include instances where the wearing of union insignia has caused interruption in production, disciplinary problems, or disharmony within the work force. No evidence of any such problems was adduced in this proceeding. Retail and service establishments have sometimes been permitted to regulate employee appearance to foster a particular public image. See *United Parcel Service,* 195 NLRB 441 (1972); *Burger King Corp. v. NLRB,* 725 F.2d 1053 (6th Cir. 1984). Even in health care settings, where employers arguably have an interest in maintaining standards of dress and professional decorum, special circumstances are carefully weighed. See *Casa San Miguel,* 320 NLRB 534, 540 (1995). There, rules banning the wearing of union insignia must be justified by a demonstration of an adverse impact on patient care in those areas where the ban applies. *Vista Hill Foundation,* 280 NLRB 298 (1986).

This discussion must be prefaced by a finding of the circumstances under which Respondent began enforcing its rules against the wearing of union insignia on drivers' uniforms and bump hats. First, I find that Respondent, notwithstanding its prohibition against the wearing of buttons and other paraphernalia on company supplied uniforms, and notwithstanding its rule against placing material on company property (bump hats), allowed the drivers to wear such paraphernalia on their uniforms and to place various stickers on their hats until the fall of 1996. The practice of drivers wearing campaign buttons in union elections had been ongoing since the 1980s, so there was nothing inherently objectionable to Respondent about the wearing of union campaign buttons. Respondent's evidence that it did not allow this practice does not ring true and I do not believe it. It offered the excuse that its supervisors had simply not seen any drivers wearing buttons on their uniforms or stickers on their bump hats until the fall of 1996 is likewise incredible. Supervisors are in regular contact with drivers and it would be nearly impossible for them not to notice the buttons and stickers. Several of the driver witnesses credibly testified that they wore buttons and stickers while in meetings and conversations with supervisors, including those testifying in this proceeding. I do not credit the testimony of the witnesses presented by Respondent in this regard. On the other hand, the credible evidence establishes that Respondent has long enforced its prohibition against placing material on its trucks.

In the present case, only three avenues of approach to special circumstances could be advanced. First is the matter of interaction with the general public, second is safety, and third is damage control. With regard to the first of these avenues, it must be noted that drivers do not interact with the general public. Other than dealings with fellow employees of E & L or its sister company, drivers come into contact with employees of its shippers at certain railsite and manufacturing locations while loading automobiles, and with certain dealership employees while delivering. Their only contact with the general public would occur if a customer of a dealer chose to watch the unloading process at a dealership. Such speculative impromptu voyeurism does not justify infringement of important Section 7 rights. Moreover, there is no prohibition against putting insignia on the drivers private hats and personal clothing, such as personal jackets. Thus, putting on insignia on a bump hat and uniform would be no more potentially offensive to a dealer's customers than would be the allowed practice of wearing of such insignia on private clothing which may be worn while the driver is at the dealership.

The record abounds in examples showing that Respondent sanctions a high degree of individual variation in dress. As noted above, until the fall of 1996, Respondent allowed drivers to wear buttons on their uniforms and arguably still does. It certainly has allowed and still allows drivers to adorn their own hats with paraphernalia, and to sport their own clothing underneath and over their uniforms. Thus, the drivers idiosyncratic appearance has

[15] See also *Meyer Waste Systems*, 322 NLRB 244 (1996); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 903 (1997).

been sanctioned by Respondent for many years. As far as the record discloses, Respondent's toleration of individual differences in dress has drawn no criticism from customers. In *Burger King Corp. v. NLRB*, supra, the Sixth Circuit found that the employer could prohibit the wearing of union insignia in furtherance of the image it wished to present to the public. Unlike here, however, the *Burger King* employer had consistently enforced its "no button" rule in a nondiscriminatory manner, and the employees had constant contact with the public. In contrast, E & L has inconsistently and discriminatorily enforced an ad hoc rule. Moreover, as noted above, drivers do not communicate directly with the ultimate consumer or even the general public. The Board has narrowly interpreted the Sixth Circuit's *Burger King* analysis. See *Maijer, Inc.,* 318 NLRB 50 (1995). In *Meijer,* the Board stated that "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees." Id. (citation omitted). Accordingly the record does not support Respondent's assertion that its sudden suppression of union paraphernalia advances a legitimate need to create a particular public image.

Respondent submitted some evidence on the issues of safety concerns and product damage control in support of its contention that these issues constitute special circumstances justifying the prohibition against drivers affixing buttons and other paraphernalia to their uniforms.[16] I found this evidence to be convincing with respect to the loading and unloading process. Car hauling is a very difficult job as loading a company truck efficiently and without causing damage to the vehicles is 90 percent of the job. Only 10 percent of the job concerns driving. E & L must pay claims when damages are shown to have occurred when E & L delivered the vehicles. Company drivers work in a confined space in loading and unloading the vehicles, necessitating the additional precautions provided by the uniform coveralls. No one in the hearing questioned that E & L has a legitimate goal of eliminating damage to the vehicles it transports. Driver Ed Reese testified that he had not heard that the coveralls were designed to augment the Company's efforts to reduce damage to automobiles, though it seems to me that they clearly were so designed.

The coveralls lessen the possibility of damaging vehicles as the coveralls prevent damage from occurring if drivers rub against vehicles while loading or unloading. Company-provided coveralls have cloth covering the main zipper and the pocket zippers. Belts and pens worn by drivers are underneath and covered by the coveralls, removing any significant concern of possible damage. While the insulated coveralls have leg zippers, they are located on the side of the lowest pant leg where the risk of contacting the vehicles during loading is minimized by the side-walking motion of the drivers. Cloth coverings are not feasible for the leg zippers due to the potential safety hazard caused by the flaps potentially getting caught on the equipment as drivers climb on their trucks. By requiring coveralls, the possibility of drivers scratching the vehicles when coming into contact with them during loading is lessened.

Respondent's witnesses testified that drivers are not permitted to wear jewelry, buttons, pins, or noncompany patches on their coveralls. While in training, drivers are told that nothing is to be worn on the coveralls.[17] Buttons represent a damage risk to the vehicles being transported because drivers come into close contact with the vehicles during loading and unloading. General Counsel witness Reese admitted the risk that pins worn on uniforms may contact the vehicles when he conceded that drivers do not wear the "Safe Driver" award pin on uniforms or coveralls because they recognize that if they lean up against something, the tie tack would bend the pin, and drivers usually try to keep their award pin from being damaged.

As was readily apparent from Respondent's Exhibit 11, a training videotape of the loading and unloading process, the process is a difficult one. Because of the necessary care and precautions, loading vehicles on the trucks can take more than 2 hours, depending on the number of vehicles to be loaded. Drivers must maneuver within very confined spaces on the truck platform. After loading a vehicle on the top platform, drivers must slide or shimmy alongside the vehicles using a narrow 6-inch-wide space to reach one of the ladders leading down the side of the truck. In addition, in using chains or hydraulic wheel chocks to secure the vehicles, drivers are leaning in and reaching all around the vehicles, potentially endangering themselves if something, even a pin, should snag, causing them to lose concentration, and risking damage if they are wearing anything on their coveralls that may scratch the vehicles.

Driver Ed Reese acknowledged that E & L has done as much as could be done to eliminate vehicle damage from drivers exiting vehicles and climbing on the truck platform during unloading and loading. E & L's damage control program has reduced its damage experience from 7 percent of vehicles in 1984 to less than 0.5 percent currently.

The uniform program also may promote the safety of the drivers. As shown on the training videotape, driver safety is promoted by the prohibition against pins and buttons while drivers are engaged in the loading and unloading process, as they pose a safety hazard for drivers during the process due to possible snagging when sliding and climbing on the trucks.

The General Counsel offered evidence that in some respects undermines Respondent's argument that safety and damage control concerns justify special circumstances justifying its involved prohibitions against the wearing of union paraphernalia on its uniforms. On the matter of safety, the drivers who testified in this proceeding are veteran drivers who share Respondent's interest in promoting safety and reducing product damage. They evidently see no danger to themselves or the Company by wearing buttons or decals. Joe Renedo, the current steward, testified that he has never heard of damage caused by a button. Dunsmore, who also served as steward for a considerable time, stated that he was unaware of any discipline for product damage resulting from buttons or pins on uniforms. There is no evidence of anyone receiving an injury caused even in part by the wearing of buttons or pins on uniforms. Likewise, there is no evidence of any product damage resulting from drivers wearing such paraphernalia.

During the hearing, Respondent tried repeatedly to have drivers testify that the uniform, and especially the coveralls, were introduced to foster safety and enhance damage control. However, each time a driver was asked to speculate, he answered that the coveralls are required to prevent the shirts and trousers from getting dirty. Plainly, Respondent never informed its drivers of its "safety" or "damage control" rationales.

Respondent's safety argument is further undercut by various of its practices. The drivers use metal chains and metal tiedown bars to fasten the cars onto the truck. Further they use the height stick, made of aluminum vertically and PVC plastic horizontally, by

[16] Clearly there are no safety or product damage control issues involved in the wearing of stickers on bump hats.

[17] Reese, however, testified that he had observed drivers with buttons similar to those worn on shirts affixed to the breast pocket of their coveralls.

which drivers measure the height of the truck so that it is able to clear overpasses on the highway. The driver moves the height stick along the truck from front to rear, in some instances touching the cars which are loaded on the top of the truck. In measuring the height of the truck, the drivers are careful not to drag it across the tops of the cars as it might scratch them. Although Respondent could coat the height stick and metal tie down bars with a material that would eliminate the potential to scratch the new cars, it has not done so.

Additionally, Respondent allows drivers to wear their own belt buckles, eyeglasses, jewelry, boots with metal buckles, and other garments with exposed metal elements. For example, during the cold months, Dunsmore continually wore a leather jacket while loading, driving, and unloading, as a result of Respondent's failure to supply him with new winter weight coveralls. This jacket has metal exposed buttons and metal rivets. I would find this evidence more compelling except that Dunsmore seems to be the exception rather than the rule. No other witness presented by the General Counsel was without the coverall element of their uniforms.

On the question of special circumstances, I believe that Respondent came up with this defense as part of its effort to disguise its obvious discrimination against Dunsmore. Though it has failed to demonstrate such special circumstances in a general sense, it has convinced me that such circumstances exist during the loading and unloading process. The videotape in evidence strongly supports this view. Even if Respondent was forced to look at the matter of buttons and pins being worn on uniforms during the loading and unloading process for the first time as a result of this case, it still has offered logical and rational concerns about the wearing such items when the drivers are in very close contact with new cars during the loading and unloading process. Given the fact that the drivers will still be able to affix stickers to their bump hats, their union message will still be visible at all times. Given this fact, I believe that balancing Respondent's legitimate concern about damage to the cars it transports against its employees Section 7 rights, Respondent should have the right to ban the wearing of pins, buttons or other paraphernalia which could scratch cars during the loading and unloading process. I find that Respondent has not shown any special circumstances which justify its sudden enforcement of a general prohibition against wearing union insignia on uniforms and hats.

I find that the most telling proof of Respondent's lack of bona fide special circumstances for such a general prohibition is the timing of Respondent's interference with employee's protected expressions. As noted Respondent tolerated wearing of insignia on uniforms for years and on bump hats for about 10 months following the issuance of the requirement that they be worn. It initiated action first against Dunsmore, and then broadened the scrutiny to Reese and others, soon after the posting period in Dunsmore's NLRB complaint case elapsed and Dunsmore filed his first election protest. The pretext for focusing upon Dunsmore was his display of Hoffa signs in two windows of the cab of his truck. The evidence reveals that for years drivers have affixed stickers and other noncompany material to their trucks. When noticed by management, these items were removed without any discipline being administered and as far as the record reveals, without further comment by management to the involved driver. Based on the evidence of record, Dunsmore was the first driver ever to be disciplined for placing noncompany material on a company truck. Moreover, campaign stickers littered Respondent's facility and no disciplinary action was taken for this activity. Whether Dunsmore's action in placing the "Hoffa 96" signs in the windows of his company truck was protected by Section 7 of the Act is problematic, yet I do not believe it important whether this act was protected or not for the purpose of deciding whether Respondent's response was unlawful.[18] Certainly the filing of the charge with the Board, which led to a complaint against Respondent, and his filing of an election protest were protected activities. Because of the timing of the action against him, immediately after the posting period of the NLRB case and the filing of his first election protest, and because of vastly disparate way Respondent responded to the placing of noncompany material on his truck, I find that its proffered reason for its increased scrutiny of Dunsmore, its threat of discipline and its actual issuance of discipline is merely pretextual and its true motivation was retaliation for the filing of the board charge and the election protest. Respondent has offered no reason why Dunsmore's action was any more egregious and deserving of discipline than the numerous examples of similar activity by drivers noted by Respondent's own witness, Maintenance Supervisor Robert Braden.

Further proof of Respondent's unlawful motivation is found in the contemporaneous characterization of Dunsmore as the "troublemaker," by the very person who disciplined him, Terminal Manager Clemens. I find that Respondent disciplined Dunsmore in retaliation for filing the Board charge and the election protest and thus its actions in this regard are in violation of Section 8(a)(1), (3), and (4) of the Act. I further find, that absent any showing whatsoever for a rationale business justification for suddenly enforcing a prohibition against the wearing of union paraphernalia on uniforms and hats, that it was likewise motivated by Respondent's desire to retaliate against Dunsmore and represents an attempt to lend an air of legitimacy and impartiality to its retaliation against Dunsmore. No safety problem, no customer complaints nor damages to vehicles caused by the wearing of union insignia on uniforms and hats was shown to have occurred in the

[18] Though such a finding is not necessary for purposes ruling on the lawfulness of Respondent's actions with respect to Dunsmore, it may be necessary to rule on complaint allegation, par. 11,b,l, wherein it alleged that Respondent violated the Act by advising Dunsmore that internal union campaign signs were prohibited in or on Respondent's trucks. The credible evidence reveals that Respondent has consistently prohibited the display on any noncompany provided material on its trucks. It has caused the removal of such material as soon as it has been discovered. Thus there was no disparate treatment involved in requiring the "Hoffa '96" signs to be removed. I do not believe that the Sec. 7 right of an employee to wear on his person union insignia extends to allowing employees to festoon a trucking company's over the road trucks with internal campaign material clearly visible to the general public. I believe Respondent has a legitimate interest in not appearing to take sides in the union election nor allow its trucks to be rolling billboards for one camp or the other. Accordingly, I do not find that the act of placing the "Hoffa '96" signs in the windows of his truck by Dunsmore was protected by the Act. I find the case cited by General Counsel in support of its contention that Dunsmore's action in this regard was protected to be distinguishable. In that case, *Yenkin-Majestic Paint Co.,* 321 NLRB 387 (1996), the Board found unlawful discipline issued to an active union supporter and employee for displaying a prounion placard on his forklift. The Board did not make a hard finding of whether this activity by itself was protected, noting that the discipline for this alleged infraction was just one event in a long line of discrimination against the employee by Respondent for his union support. Board Member Cohen did not "pass" on this contention, noting that he does not necessarily subscribe to the notion that the placing of a placard on a forklift is the same as the wearing of a small insignia. Moreover, placing a prounion placard on a warehouse forklift during an organizing campaign is a long way from placing internal union campaign material in an over-the-road truck.

fall of 1996.[19] No problems of discord among employees by their support for Carey or Hoffa was shown to have surfaced in this timeframe. In short, nothing out of the ordinary happened to trigger the change in the status quo, other than Dunsmore's protected activity. I therefore find the instances of enforcement of the prohibition as set out in the compliant to be unlawfully motivated and violative of Section 8(a)(1) of the Act. I accordingly find that the discipline issued to employee Ed Reese on September to be unlawfully motivated and in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent E & L Transport Company, L.L.C., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act by:

(a) About September 17, at its Wixom facility, by its agent Jim Donlin, subjecting its driver employee Donald Dunsmore to excessive scrutiny by conducting a search of his company truck for internal union campaign literature, including using a camera to take pictures.

(b) About September 18, by its agent Lawrence F. Murray subjecting Dunsmore to excessive scrutiny by conducting a search of his truck for internal union campaign literature and/or campaign signs and impliedly threatening Dunsmore with termination because of internal union campaign literature found in his company truck.

(c) About September 20, by its agent Lawrence Murray in a phone call to its agent Chris Trimble, orally announcing to employees that its rule prohibited employees from placing stickers and/or signs on bump hats.

(d) About September 20, by its agents Lawrence Murray, Chris Trimble, and Gerald Clemens, threatening employees with termination because of their failure to remove employee stickers and/or signs from bump hats.

(e) About October 16, by its agent, Mike Ervin, stating he was present to harass Dunsmore and ordering him to remove internal union campaign stickers from his safety hat.

(f) About October 16, by its agent, Chris Trimble, ordering Dunsmore, under threat of reprimand and discharge, to remove internal union campaign stickers from his bump hat.

(g) About October 16, by its agent, Ron Kilmer, ordering Dunsmore to remove stickers from his bump hat.

(h) About the end of October, by its agents, Ted Marcott and Sean McCarty, on separate occasions, ordering its employees to remove stickers and/or signs from bump hats.

(i) About the first week of November, by its agents, Mike Ervin and Ted Marcott, ordering employees to remove stickers from their bump hats.

(j) About October 25, by its agent Chris Trimble, orally and disparately promulgating an overly broad rule prohibiting employees from wearing internal union campaign buttons on their uniforms and ordering Dunsmore to remove a button from his uniform.

(k) About late October, by its agent, William Erb, orally and disparately promulgating an overly broad rule prohibiting employees from wearing internal union campaign buttons on their uniforms.

(l) About October 29, by its agent, Gerald Clemens, referring to Dunsmore as "the troublemaker."

4. Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act, by, about September 23, issuing a written reprimand to employee/alternate Union Steward Ed Reese for failing to remove stickers from his bump hat.

5. Respondent has engaged in conduct in violation of Section 8(a)(1), (3), and (4) of the Act by, about September 23, by its agents, Chris Trimble and Gerald Clemens, issuing Dunsmore a written reprimand for having internal union signs in his truck.

6. The unfair labor practices committed by Respondent are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not violate the Act by advising Donald Dunsmore that internal union campaign signs were prohibited in or on Respondent's trucks.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully issued written warnings to Ed Reese and Donald Dunsmore, Respondent should be ordered to, within 14 days from the date of the Order, rescind such warnings and remove from its files any reference to the unlawful warnings, and within 3 days thereafter notify the employees in writing that this has been done and the warnings will not be used against them in any way.[20]

Having, on or about September 15, 1996, and continuing thereafter, discriminatorily departed from the status quo by enforcing its rules prohibiting the wearing of buttons and pins on uniforms and stickers on bump hats, Respondent should be ordered to return to the status quo existing before September 15, 1996. It should further be ordered to rescind the rule prohibiting the wearing of stickers on bump hats and the wearing of buttons and pins on uniforms, except when a driver is engaged in loading and unloading a company truck.

[Recommended Order omitted from publication.]

[19] Respondent has asserted some concern that if the wearing of union insignia on uniforms and hats is found lawful, then its drivers will become walking billboards. Though the problem has never occurred in the years when it tolerated such activity, if it does, then Respondent has a ready remedy in its collective-bargaining agreement which requires that the drivers maintain a "reasonably neat appearance."

[20] The warnings do not indicate that either employee suffered any monetary loss so there will be no award of backpay.